Memorandum

to Glenn Curry FY. Jane

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cy made for J. Kloeckner 7/17

Subject: CERCLA 107(a)(3) Liability -- Mining Cases

Date: June 19, 1989

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To: EES and EDS Lawyers

From: Ben Fisherow
EES

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For those of you involved in CERCLA mining cases, and for those interested in the development of (a)(3) arrangements for treatment or disposal, the attached opinion of Chief Judge Jenkins in the District of Utah may be of interest.

This is litigation between Sharon Steel, one of the defendants in our CERCLA 106/107 case, and various third party defendant mining companies that sold raw ore to the mill operated by Sharon's predecessor. The Court granted the mining companies' motions to dismiss or for summary judgment on liability.

Note that raw ore containing hazardous substances is not a "hazardous substance" (p.5) and that the mining companies who sold the ore to the mill were not disposing of or discarding a waste product (p.9).

Incidentally, we recently added an (a)(3) count against one of our defendants in the case based on allegations that it had shipped its raw ore to the mill for processing, but had retained title to it throughout.

CCY opinion only to: Underberger, Van Slyke, Salo, Diamond, Guerci, RCs, Allen, Shelton, Alcalas

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. SHARON STEEL CORPORATION, UV INDUSTRIES, INC., and UV INDUSTRIES, INC. LIQUIDATING TRUST, Defendants.	Civil No. 86-C-0924J
SHARON STEEL CORPORATION, a Pennsylvania corporation, Third-party Plaintiff, v. THE STATE OF UTAH; NEWPARK RESOURCES, INC., a corporation; PARK CITY CONSOLIDATED MINES, a corporation; CHIEF CONSOLIDATED MINING COMPANY, a corporation; and JOHN DOES 1 through 100, individuals, companies and corporations; Third-party Defendants.	MEMORANDUM OPINION AND ORDER

The United States brought this action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9657 (1982), and the Resource

Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6971-6979, against Sharon Steel Corporation ("Sharon") and others to recover the costs of cleaning up tailings at a site in Midvale, Utah, where Sharon's predecessor owned and operated a mill for processing ore.[1] The tailings, consisting of ground rock in the form of a sand-like slurry, were created when ore was processed at the mill. The United States has alleged that the tailings contain hazardous substances that may be released into the environment. Sharon has filed a third-party complaint against the state of Utah and against three mining companies that sold ore to Sharon's predecessor--Newpark Resources, Park City Consolidated Mines and Chief Consolidated Mining Company--claiming that they are liable to Sharon for contribution or indemnification if Sharon is found liable for hazardous conditions at the site. The third-party defendants filed various Motions to Dismiss or for Summary Judgment.[2] The court now

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[1]United States Smelting Refining and Mining Company (USSRMC) operated a smelter and flotation mill at the Midvale Site from about 1900 until 1971. USSRMC later became UV Industries, Inc. In 1979, to facilitate its dissolution, UV sold its assets to Sharon Steel. UV was dissolved in 1980. The United States has sued Sharon Steel, UV Industries, Inc., and UV Industries, Inc. Liquidating Trust. The 1979 transaction between UV and Sharon is the subject of cross-motions for summary judgment by Sharon and the Liquidating Trust. Those motions are currently under advisement.

[2]The court previously denied the State of Utah's Motion for Summary Judgment. See Order dated July 13, 1988. Park City Consolidated Mines filed a Motion to Dismiss, Chief Consolidated Mining Company and Newpark Resources filed Motions for Summary Judgment.

enters this Memorandum Opinion and Order granting the remaining third-party defendants' motions.

I.

Sharon has alleged that the third-party defendant mining companies are potentially liable persons under section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), for indemnification or contribution. The specific language of section 107(a)(3) is as follows[3]:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section---
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> * * *
>
> (3) any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration entity and containing such hazardous substances, and
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> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable . . .[for the statutory response costs].

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[3]Stripped of its excess verbiage, the statute indicates that four groups of individuals are potentially liable for response costs:

> 1) the owner and operator of a vessel or facility; 2) owners or operators of a facilities at which hazardous wastes are disposed; 3) any person who by contract, agreement or otherwise arranged for the transport to or disposal or treatment of hazardous wastes at a facility owned by another; 4) any person who accepts or accepted any hazardous substance for transport to disposal or treatment facilities.

O'Niel v. Picillo, 682 F. Supp. 706, 718 n.2 (D.R.I. 1988).

The third-party defendants assert several arguments in support of their motions. The arguments raised in their motions are substantially similar and therefore, will be treated jointly. First, they argue that they never made any decisions as to how any resulting waste would be disposed of or treated. See Newpark Memorandum at p. 14. They seek to apply the "who-decided" rule. This rule states that the liability ends with the person who "both owned the substance and made the decisions about its disposition." See Reply Memorandum of Park Con to Memorandum of UV Trust at p. 3. In support of this argument they cite United States v. Westinghouse, 22 Env't Rep. Cases (BNA)(S.D. Ind. 1983), United States v. Conservation Chemical Company, 619 F. Supp. 162 (D. Mo.1985) and United States v. A & F Materials Co., 582 F. Supp. 842 (S.D. Ill. 1984), among others.

Sharon contends that they are liable as generators of hazardous substances because they sold the raw ore knowing or with reason to know that "it would be treated and that tailings would be generated at Midvale." Sharon Memorandum at p. 2.

Sharon also argues that the third-party defendants cannot escape liability by characterizing their transaction as a sale rather than a disposal. The third-party defendants do not appear to assert that the fact that a sale occurred, alone exempts them from the language of the statute.

In addition, the third-party defendants argue that by adopting the definition of "disposal" and "treatment" contained

in the Solid Waste Disposal Act, the determination under CERCLA is limited to whether a product is a hazardous "waste" rather than a hazardous "substance." Sharon argues that the definition of hazardous substance is broader than hazardous waste. Sharon contends that unprocessed ore is a hazardous substance because it contains hazardous substances, even though the substances are not hazardous in the ore until they are released through processing.

This court's determination is necessarily a contextual one. In the form in which it was sold to Sharon's predecessor, this court is of the opinion that raw ore was not a hazardous substance.[4] It is through processing that the ore is altered and concentrated to the point that it is rendered potentially hazardous. Raw materials, which do not pose an immediate threat without further treatment by a party further down the production stream, are not hazardous substances. Although no courts appear to have directly confronted the limitation of liability where a primary product or raw material is involved, several recent

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[4]Neither party has questioned whether the transaction between the third-party defendants and Sharon's predecessor can be characterized as a true sale. Nor has this court been directed to anything in the record to indicate that the third-party defendants retained any interest whatsoever in the ore after the sale. In fact, the parties themselves refer to the transaction as a sale and have attached many exhibits indicating an intent sell and purchase ore at a price which varies according to mineral content. Retention of an interest might affect a determination as to whether a party arranged for disposal of a hazardous substance. See U.S. v. Aceto Agricultural Chemicals Corp., ___ F.2d ___, 1989 W.L. 38766 (8th Cir. (Iowa)).

decisions have limited the liability under CERCLA of sellers of products altered by subsequent processing or use.

In C. Greene Equipment Corporation V. Electron Corporation, 697 F. Supp. 983 (N.D. Ill. 1988), Electron Corporation sold the plaintiff equipment that had encased within it certain hazardous substances. Among other factors, the court found it persuasive that the "hazardous waste was totally enclosed in the equipment when Electron sold it." The court did not hold the original seller liable under CERCLA. In Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651 (N.D. Ill. 1988), the court refused to hold suppliers of wood treatment products liable for selling chemicals to a wood treatment plant which later disposed of the chemicals improperly. Recently, the United States Court of Appeals for the Eighth Circuit recognized that courts generally refuse "to impose liability where a 'useful' substance os sold to another party, who then incorporates it into a product, which is later disposed of." U.S. v. Aceto Agricultural Chemicals Corp., ___ F.2d ___, 1989 W.L. 38766 (8th Cir. (Iowa)). See also Florida Power & Light v. Allis-Chalmers Corporation, 2 Toxics L. Rep. (BNA) 1278 (March 22, 1988); United States v. Westinghouse, 22 Env't Rep. Cases (BNA)(S.D. Ind. 1983); United States v. Farber, 18 Envt'l. L. Rep. 20854 (D.N.J. Mar. 16, 1988).

Furthermore, the language of the statute implies that the hazardous waste to be disposed of or treated must be capable of entering the environment or being emitted into the air or water

in its present condition.[5] Without further processing, raw ore does not pose such a threat. As one court noted:

> Generators of waste seldom operate at the first point in the stream of production; usually other companies operate "upstream" from waste generators, and sell raw materials and unfinished products which are purchased by generators. Because the involvement of upstream producers in the production of wastes ordinarily ends at the point of the sale of the raw materials, it could hardly be said that such producers thereby arrange for the disposal of hazardous wastes. Thus, they are not ordinarily liable under § 107(a)(3).

United States v. Aceto Agricultural Chemical Company, 699 F. Supp. 1384, 1386 (S.D. Iowa 1988), aff'd, ___ F.2d ___, 1989 W.L. 38766 (8th Cir. April 25, 1989).

Many of the cases cited by Sharon in opposition involve the sale of a waste product or by-product which is not useful and is already hazardous without additional processing. United States v. Conservation Chemical Company, 619 F. Supp. 162 (D. Mo. 1985) (sale of fly ash); United States v. A & F Materials Co., 582 F. Supp. 842 (S.D. Ill. 1984)(sale of spent caustic solution); Violet v. Picillo, 648 F. Supp. 1283 (D.R.I. 1986)(HTH samples,

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[5] 42 U.S.C. § 6903(3) states that the term disposal means "the discharge, deposit, injection,dumping, spilling, leaking, or placing of any . . . hazardous waste into or on any land . . . so that such . . . hazardous waste . . . may enter the environment." (underlining added). It is also interesting to note that the definition of "hazardous waste" in 42 U.S.C. § 6903(5) indicates that among other things, hazardous waste is solid waste which because of certain aspects may pose a "present . . . hazard to human health . . . .". In CERCLA itself, the definition of hazardous substance includes "any imminently hazardous chemical substance. . . ." 42 U.S.C. § 9601(14). These terms connote an element of immediacy.

polyols, Isocyanates, solid pesticides, fungicides and insecticides, organic liquids including organic acids, inorganic acids, alkaline chemicals, including sodium hydroxide and ammonium hydroxide).

Furthermore, it is apparent that congress intended to incorporate the concept of "waste" into the terms "disposal" and "treatment." The unprocessed mining ore sold by the third-party defendants does not fit within the definition (or concept) of "waste." These terms are defined by reference to the Solid Waste Disposal Act.[6] The term 'disposal' is defined as:

> [T]he discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3). The term "treatment" is defined as follows:

> The term "treatment", when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition if hazardous waste so as to render it nonhazardous.

42 U.S.C. § 6903(34). The term "hazardous waste" means:

> [A] solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may--

[6]42 U.S.C. § 9601(29) states that "'disposal', 'hazardous waste', and 'treatment' shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C. § 6903]."

> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or an incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5) (1982). The term "solid waste" is defined as:

> [A]ny garbage, refuse, sludge from waste treatment plants, water supply treatment plant, or air pollution control facility and other discarded material . . . .

42 U.S.C. § 6903(27).

These interrelated definitions clearly indicate that the terms "disposal" and "treatment" as found in CERCLA, refer to "hazardous waste" or "solid waste." The third-party defendants were not disposing of or discarding a waste product.[7] Rather, they were selling a raw material or primary product to another party in the stream of commerce.[8]

Furthermore, the same statute to which CERCLA refers for its definition of "treatment", "disposal", and "hazardous waste",

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[7]They sold the ore for valuable consideration. See e.g. Exhibit A attached to Memorandum of Park City Consolidated Mines Co. Supporting Its Motion To Dismiss Third-Party Complaint. As mentioned above, this court is proceeding under the assumption that a true sale occurred.

[8]Third-party defendants acknowledge that the fact that a sale occurred, alone does not exempt them from the language of the statute. E.g. United States v. Farber, 18 Envt'l. L. Rep. 20854 (D.N.J. March 16, 1988); New York v. General Electric Company, 592 F. Supp. 291 (N.D.N.Y. 1984).

includes raw ore in its definition of "virgin materials", clearly in contrast to the definition of hazardous waste. 42 U.S.C. § 6903(35).

This court recognizes that CERCLA employs the term "hazardous substance"[9] in place of "hazardous waste." However, given the definitions mentioned above, it is difficult to see how one can arrange for the treatment or disposal of anything other than waste. The definitions of "disposal" and "treatment" compel us to limit our inquiry to whether the sale of unprocessed ore is the disposal or treatment of a waste.[10] This court finds that the unprocessed ore sold by the third-party defendants to Sharon's predecessor was at the time of the sale, not waste. This court also finds that at the point of sale, the unprocessed ore was not a hazardous substance. Accordingly, the third-party defendants could not have arranged for the treatment or disposal

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[9]Hazardous substance" is defined in 42 U.S.C. § 9601(14) as:

> (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act . . . , (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act . . . , and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action . . . .

[10]Several courts have recognized similar difficulties with this statute. E.g., United States v. Aceto Agricultural Corp., 699 F. Supp 1384 (S.D. Iowa 1988); Edward Hines Lumber Co v. Vulcan Materials Co., 685 F. Supp. 651 (N.D. Ill. 1988); O'Niel v. Picillo, 682 F. Supp. 706 (D.R.I. 1988).

of a hazardous substance as required by 42 U.S.C. § 9607(a)(3), to incur liability.

Applying the legal principles mentioned above to this case, the court concludes that no disputed issues of material fact exist. The third-party defendants, New Park Consolidated Mines, Park City Consolidated Mines and Chief Consolidated Mining Company's Motions For Summary Judgment or To Dismiss are GRANTED. Let judgment be entered accordingly.

DATED this 17 day of May, 1989.

BY THE COURT:

BRUCE S. JENKINS, JUDGE
UNITED STATES DISTRICT COURT

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